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No. 71-1217

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

SOLOMON GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1972. The petition for a writ of certiorari was filed on March 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reading the indictment to the jury, the court erred in omitting references to a codefendant not on trial.

2. Whether the indictment properly charged mail fraud violations of 18 U.S.C. 1341.

3. Whether the evidence was sufficient to support petitioner's conviction.

STATEMENT

A thirty-nine count indictment charged petitioner and eight others in the United States District Court for the Central District of California with a mail fraud scheme in violation of 18 U.S.C. 1341 (C.T. 2-43).[1] Count 1 described a scheme to defraud United Airlines and others by using credit cards to make purchases of airline tickets over a period of time with no intention of paying for them, and by later selling them at a reduced rate to defendant Kelem, who in turn would sell them at reduced rates to the public. Counts 1 and 2 charged mail fraud violations by Kelem. The other 37 counts charged mail fraud violations by the other defendants and aiding and abetting by Kelem. After a jury trial of petitioner alone on counts 7, 8 and 9 (C.T. 11-13),

[1] "C.T." refers to the Court's Transcript; "R.T." to the Reporter's Transcript, copies of which we have lodged with the Clerk of this Court.

he was found guilty on all three counts (R. 355-356).[2] On October 19, 1970, imposition of sentence was suspended; petitioner was placed on probation for three years and ordered to make restitution to United Airlines in the amount of $1,514.66 (R.T. 383-384). The court of appeals affirmed the conviction *per curiam* (Pet. App. A).

The evidence showed that in the summer of 1966, petitioner was informed by Kelem, a friend for fifteen years and the owner of a Hollywood discount shop, that he needed airline tickets for customers. Petitioner offered to supply the tickets to Kelem for 85 percent of their face value (R.T. 103-105). In June 1966 Kelem requested tickets of petitioner for J. Paul Levine and his wife and child; in August 1966, for one Ratner; and in October 1966, for a Mr. and Mrs. Hodges and a Mrs. Young (R.T. 106-107). On each occasion petitioner used a United Airlines credit card issued in his own name, and was identified as the person who had purchased the tickets at three different travel agencies (R.T. 93, 112-113, 138). In connection with two of the purchases, petitioner identified himself as a relative of the persons in whose name the tickets were being written, in compliance with United Airlines policy that a credit

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[2] Prior to petitioner's conviction, the cases against the other defendants had been disposed of. The convictions of Kelem and Gartrell had been affirmed in a comprehensive opinion delineating the nature and operation of the scheme to defraud. *United States* v. *Kelem*, 416 F. 2d 346 (C.A. 9), certiorari denied, 397 U.S. 952.

card could be used only by the holder and members of his family (R.T. 114, 140, 197).

Levine and Ratner paid Kelem approximately 85 percent of the face value of the tickets (R.T. 70, 129). One Irvin, who purchased the tickets for the Hodges and Mrs. Young, paid with merchandise and a due bill (R.T. 77-80). After each of the three ticket purchases, an employee of the travel agency placed in the United States mail for delivery to United Airlines in Chicago a copy of the invoice evidencing the credit card purchase (R.T. 88-89, 119, 141-142). The policy of United Airlines was that the credit card invoice be mailed to Chicago within twenty-four hours of purchase (R.T. 89). On one occasion, petitioner asked a travel agent to "hold off sending a ticket until the following day to Chicago, because he already has his limit for that day" (R.T. 95).

United Airlines cancelled petitioner's credit card on September 27, 1966 (R.T. 205). Prior to that time, on July 18, 1966, petitioner had made a $147.33 payment when his total indebtedness to United Airlines was $2,545.31; and on August 25, 1966, a $254.53 payment when his total indebtedness was $2,942.57 (R.T. 200-202). On March 30, 1967, petitioner made a third payment with a $250 check when his total indebtedness was $14,386.64, but the check was returned because of insufficient funds (R.T. 202, 210, 220).

ARGUMENT

1. At the beginning of the trial the court told the jury that the indictment charged violations against numerous persons, but that they should be concerned only with charges against petitioner (R.T. 7). The court read the part of count 1 describing in general terms the fraudulent credit card scheme (R.T. 7-10). Since paragraph 4 did not mention petitioner, his counsel agreed that it was not necessary to read it (R.T. 10). Petitioner's counsel also agreed that it was unnecessary to read the concluding paragraph of count 1 charging defendant Kelem with a substantive mail fraud offense (R.T. 12). The court, without defense objection, also refrained from reading the final paragraph of counts 7, 8, and 9 which charged Kelem with having aided and abetted petitioner in committing the offenses under those counts (R.T. 12-14). Substantially the same procedure was followed in reading parts of the indictment in the final instructions to the jury (R.T. 323-328).

Contrary to petitioner's contention, the trial court did not err when in reading the indictment to the jury it omitted the references mentioned above. Although it was necessary that the jury be advised of the nature of the charges against petitioner, this did "not necessarily require a reading of the indictment to the jury either in whole or in part." *Robles* v. *United States*, 279 F. 2d 401, 403-404 (C.A. 9); *Martin* v. *United States*, 335 F. 2d 945, 950 (C.A. 9); *Nick* v. *United States*, 122 F. 2d 660, 670 (C.A.

8), certiorari denied, 314 U.S. 687. A sufficient part of the indictment was read to meet the requirement that the jury be fairly apprised of the nature of the charges against petitioner. We note that since the court properly instructed that the indictment was only an accusation of crime and not evidence (R.T. 318), the reading of only the pertinent part of the indictment could not constitute prejudicial error.

Contrary to petitioner's contention (Pet. 5-7), he was not convicted under an indictment different from the one charged by the grand jury, as proscribed in cases such as *Ex parte Bain*, 121 U.S. 1, and *Stirone* v. *United States*, 361 U.S. 212. The indictment itself was not amended in any way; parts of it, referring to other defendants, were omitted in the reading to the jury only for the purpose of clarity in focusing attention upon the specific charges against petitioner.

2. There is no merit to petitioner's contention that the indictment did not properly charge a mail fraud violation of 18 U.S.C. 1341. Under that section the elements of the offense are (1) a scheme to defraud, and (2) mailing of the matter involved for the purpose of executing the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Blosser*, 440 F. 2d 697, 700 (C.A. 10); *United States* v. *Regent Office Supply Co.*, 421 F. 2d 1174 (C.A. 2). The indictment in this case contained these essential allegations (C.T. 1-4, 11-13) and was legally sufficient. *United States* v. *Sampson*, 371 U.S. 75; *Dra-*

now v. *United States*, 307 F. 2d 545, 557-558 (C.A. 8).[3]

3. The evidence, as summarized in the Statement, *supra*, was sufficient to support petitioner's conviction. It disclosed both the scheme to defraud and the mailing procedures involved for the purpose of executing the scheme. It was not necessary that the prosecution show that petitioner authorized mailing the various invoices evidencing the credit card purchases; it was sufficient to show his knowledge that in the execution of the scheme the invoices were likely to be mailed. *United States* v. *Sternback*, 402 F. 2d 353, 354-355 (C.A. 7), certiorari denied, 393 U.S. 1082. Since petitioner, with knowledge that use of the mails would follow in the ordinary course of business, purposely followed a course of conduct designed to invoke the mailing procedures of United Airlines, he "caused" the mailings within the terms of the statute. *Pereira* v. *United States*, 347 U.S. 1, 8-9; *United States* v. *Kelem*, 416 F. 2d 346, 348-349 (C.A. 9), certiorari denied, 397 U.S. 952.

Nor was petitioner's conviction invalid under *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, on the ground that since the mailings occurred after he had accomplished his ob-

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[3] Petitioner argues that since the government had dismissed count 1 as to Kelem, its subject matter could not be realleged in counts 7, 8 and 9 to give them validity (Pet. 10-11). The record, however, shows that the government had not moved to dismiss count 1, but that Kelem had been found guilty and sentenced on that count (R.T. 231).

jective by obtaining the airline tickets, the mailings could not have been for the purpose of executing the scheme. This Court held in *United States* v. *Sampson*, 371 U.S. 75, 80:

> We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be "for the purpose of executing" the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes.

Here the mailings plainly furthered the scheme to defraud. See *Kelem*, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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